UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 02-6241
Filed: June 27, 2003

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THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 27th day of June, Two Thousand and Three.

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PRESENT: HONORABLE Pierre N. Leval,
HONORABLE Reena Raggi
*Circuit Judges,*
HONORABLE Frederick J. Scullin, Jr.*

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* The Honorable Frederick J. Scullin, Jr., Chief Judge of the United States District Court for the Northern District of New York, sitting by designation.

DANIEL HECHT,
by his co-guardian, Donald Hecht,

*Plaintiff-Appellant,*

*v.*

JO ANNE B. BARNHART,
Commissioner of the Social Security Administration,

*Defendant-Appellee.*

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APPEARING FOR APPELLANT: CHARLES ROBERT, Kassoff, Robert, Lerner & Robert, LLP, Rockville Centre, New York *for Plaintiff-Appellant.*

APPEARING FOR APPELLEE: VINCENT LIPARI, Assistant United States Attorney, Eastern District of New York, Brooklyn, New York (Roslynn R. Mauskopf, United States Attorney for the Eastern District of New York, Varuni Nelson, Kathleen Mahoney, Assistant United States Attorneys, on the brief) *for Defendant-Appellee.*

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## SUMMARY ORDER

Appeal from the United States District Court for the Eastern District of New York (Arthur D. Spatt, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the United States District Court for the Eastern District of New York entered September 3, 2002, is hereby AFFIRMED.

Appellant Daniel Hecht, who in 1974 was rendered totally disabled by a pertussis inoculation, through his guardian challenges the district court's judgment affirming the decision of Appellee Commissioner of the Social Security Administration ("SSA") to reduce Hecht's Supplemental Security Income ("SSI") benefits in light of a monthly disbursement to his parents of $750 out of a Supplemental Needs Trust ("SNT") to cover expenses for their son's room and board.[1]

As we explained in *Ellis v. Apfel*, 147 F.3d 139, 141 (2d Cir. 1998), the SSA, operating within a "complex regulatory framework," provides SSI benefits to disabled individuals who meet statutory income and resource limitations. In Hecht's case, the SSA decided that funds in his irrevocable SNT account did not constitute a "resource" that rendered him ineligible for SSI benefits. *See* 20 C.F.R. § 416.1201(a) (1994) (noting that cash, liquid assets, or property qualifies as a "resource" for purposes of calculating benefits if the individual both owns the property and has the right to convert it to cash to be used for his support and maintenance); *see also* SSA Programs Operations Manual System ("POMS") SI 01120.200(D)(2) (noting that trust principal is not a resource if beneficiary lacks legal authority to revoke the trust or direct the use of its assets to his own support). Conversely, the SSA decided that disbursements from that same trust to reimburse Hecht's parents for his room and board did qualify as "income," thereby warranting a reduction in his benefits, *see* POMS SI 01120.200(E)(1) (noting that disbursements from a trust paid directly to the benefici-

[1] The fund's principal consists of a $500,000 award that Hecht received in 1988 to settle a malpractice suit relating to his disability.

ary or to a third-party in return for the beneficiary's receipt of food, clothing, or shelter qualify as income).[2]

In reviewing a district court decision upholding an SSI benefits determination, "we conduct a plenary review of the administrative record to determine if there is substantial evidence, considering the record as a whole, to support the Commissioner's decision and if the correct legal standards have been applied." *Shaw v. Chater*, 221 F.3d 126, 131 (2d Cir. 2000) (citing *Schaal v. Apfel*, 134 F.3d 496, 500-01 (2d Cir. 1998)). On this appeal, Hecht raises no evidentiary challenges; rather, he asserts that the district court failed to apply the correct legal standards to his case. Upon review of the district court's thoughtful memorandum and order, we disagree.

First, the district court did not err in declining to apply 20 C.F.R. § 416.1130(b) (1998) or *Jackson v. Schweiker*, 683 F.2d 1076 (7th Cir. 1982), to Hecht's case. 20 C.F.R. § 416.1130(b) is a regulation concerned with income in the form of a rent subsidy, i.e., the difference between what an SSI applicant actually pays for rooming expenses and fair market value. In *Jackson*, where the SSI recipient was paying 77% of his income for rent, the Seventh Circuit questioned the propriety of treating any rent subsidy as "income" absent evidence that it actually made "additional resources available to the recipient (increased purchasing power) to meet his or her basic needs." 683 F.2d at 1087. *See Ruppert v. Bowen*, 871 F.2d 1172, 1180 (2d Cir. 1989) (relying on *Jackson* in

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[2] An SSI recipient is awarded a flat monthly benefit, which can then be reduced if he receives non-excludable "income." *See* 42 U.S.C. § 1382(b). "Income" is defined "as anything that a recipient receives in cash or in-kind that can be used to meet the recipient's needs for food, clothing and shelter. 20 C.F.R. § 416.1102." *Ellis v. Apfel*, 147 F.3d at 141.

noting that rent subsidy might appropriately be disregarded as in-kind income where person paid disproportionate share of income for housing). In this case, however, as the district court correctly observed, Hecht does not himself pay any rent. Rather, it is the SNT trustee who, pursuant to court order, pays Hecht's parents for his room and board. When a third party pays a recipient's expenses, the applicable regulation is 20 C.F.R. § 416.1103(g) (1994), which provides for "the value of anything the recipient receives as a result of such payment [to be] included in the recipient's income." *Ellis v. Apfel*, 147 F.3d at 141. Thus, a third party's payment of some amount for room and board provides Hecht with in-kind income pursuant to § 416.1103(g). Because we conclude that both the district court and the SSA correctly rejected Hecht's argument that the SSA should rely exclusively on *Jackson*'s rent subsidy analysis in determining his receipt of in-kind income, we further conclude that the district court properly declined to review alleged geographic disparities in the SSA's treatment of rent subsidies or to remand the case for further evidentiary exploration of that issue.

Second, the district court did not err in relying on the POMS in upholding the SSA's benefits determination. Hecht is correct that such policy statements are not entitled to the same *Chevron* deference as implementing regulations. *See Christensen v. Harris County*, 529 U.S. 576, 587-88 (2000) (discussing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). Nevertheless, policy statements are "entitled to respect" to the extent that they have the "power to persuade." *Id.* at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *see also McMenemy v. City of Rochester*, 241 F.3d 279, 284 (2d Cir. 2001) (upholding statutory interpretation in agency manual that was consistent with language and purpose of the law, not-

ing that "even when deference is not required, an agency has a 'body of experience and informed judgment to which courts and litigants may properly resort for guidance' " (quoting *Skidmore*, 323 U.S. at 140)). The distinction POMS SI 01120.200 draws between trust principal and disbursements is persuasive both because it is consistent with the treatment of in-kind income in 20 C.F.R. § 416.1103(g) as well as with New York State trust law. *See* N.Y. Est. Powers & Trusts Law § 7-1.12(b)(3) (McKinney 2002) ("actual distributions from the trust may be considered to be income or resources of the beneficiary to the extent provided by the terms of any [government benefits] program").

Third, to the extent Hecht complains that the SSA's failure to provide him with adequate notice of the regulations relied on in its benefits determination denied him due process, the claim merits little discussion given that the Appeals Council set forth the basis for the SSA's final determination. Further, for the reasons stated by the district court and in this order, Hecht's legal challenges to the SSA's application of relevant regulations is without merit.

Finally, Hecht submits that the state court order authorizing trust disbursements was specifically crafted to avoid any reduction in his SSI benefits and that the district court's contrary ruling runs afoul of the *Rooker-Feldman* abstention doctrine. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). Pursuant to *Rooker-Feldman*, "a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's rights." *Johnson v. DeGrandy*, 512 U.S. 997, 1005-06 (1994). The doctrine is inapplicable. SSA did not lose in the state courts; it was not

even a party to the state court proceedings. And the state court, whatever may have been its intentions, had no authority over the effect of its ruling on SSI benefits.[3]

For the reasons stated, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT:
ROSEANN M. MACKECHNIE, CLERK

By: /s/ OLIVA M. SCORGE
Oliva M. Scorge

Date: June 27, 2003

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[3] *Navarro v. Sullivan*, 751 F. Supp. 349 (E.D.N.Y. 1990), upon which Hecht relies, is not to the contrary. At issue in *Navarro* was whether trust funds constituted a "resource" under 20 C.F.R. § 416.1201, thereby rendering plaintiff ineligible for SSI benefits. The district court did not abstain from considering that issue; rather, it ruled that use restrictions imposed on the trust funds by the state court deprived plaintiff of the power to liquidate the assets for his support and maintenance, which power was critical to the federal definition of "resource." *Id.* at 350. In this case, where the issue is whether trust disbursements constitute "income," the same court may not have intended for room and board payments to reduce Hecht's SSI benefits, but such third-party payments fall squarely within the definition of in-kind income pursuant to 20 C.F.R. § 416.1003(g) and POMS SI 01120.200(E)(1)(b).

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration
21009-43-7471

Refer to: S3E63 SI 1-3.1.12
Date: June 14, 1991
From: Deputy Commissioner for Programs
Subject: Rental Subsidies—DECISION
To: Commissioner of Social Security
Through: OEO _____

*ISSUE*

At issue is the appropriate treatment of rental subsidies in relation to income under the Supplemental Security Income (SSI) program.

*PRESENT POLICY*

A rental subsidy is the difference between the current market rental value of housing and the amount of rent a landlord charges under a nonbusiness arrangement. Such a subsidy is considered to be in-kind support and maintenance in the form of shelter and is subject to the presumed maximum value rule. That is, the total monthly value of all in-kind support and maintenance is presumed not to exceed one-third of the applicable Federal benefit rate plus $20. (At 1991 rates, the presumed maximum value for an individual is $155.66 and that for a couple is $223.33.) However, if a claimant shows that the actual value of in-kind support and maintenance is lower than the presumed maximum value, we use the actual value to determine eligibility and payment amount.

*LAW, REGULATIONS, AND RULINGS*

Section 1612(a)(2)(A) of the Social Security Act (the Act) provides that unearned income includes support and maintenance furnished in cash or kind. The Act does not define in-kind support and maintenance or mention rental subsidies.

Regulations (20 CFR 416.1130(b)) define in-kind support and maintenance as food, clothing, or shelter that is given to an individual or that an individual receives because someone else pays for it. Shelter consists of a number of items, including room and rent; however, there is no in-kind support and maintenance in the form of room or rent if a tenant pays the amount charged under a business arrangement.

The same regulatory section contains two rules concerning business arrangements: one for residents of Seventh Circuit States (Illinois, Indiana, and Wisconsin) and another for all others. However, Acquiescence Ruling (AR) 90-2(2), which became effective on July 16, 1990, extends the Seventh Circuit rule to Second Circuit States (Connecticut, New York, and Vermont).

> *General Rule*: A business arrangement exists when the monthly required rent equals the current market rental value of the property. In the absence of a business arrangement, the value of a rental subsidy is the difference between the current market rental value of the premises and the amount of rent required by the landlord.
>
> *Exception for Second and Seventh Circuits*: A business arrangement exists when the monthly required rent equals or exceeds the presumed maximum value.

If the required rent is less than the presumed value, the amount of the rental subsidy is the difference between the required rent and either the presumed value or the current market rental value, whichever is lower.

*CURRENT OPERATING POLICY*

Operating instructions assume that the amount of required rent equals the current market rental value unless a household member is the parent or child (including an "adult child") of the landlord or the landlord's spouse. This assumption resulted from early program data which indicated a higher incidence of rental subsidies when such a filial relationship existed. The assumption eliminates the need to determine the current market rental value for every individual who lives in a rented dwelling. Consequently, we determine a current market rental value only in a limited number of cases and the number of persons found to be receiving a rental subsidy is even smaller: 18,500 cases in December 1988 (or .5 percent of the SSI population) with an average rental subsidy of $59. Very few of these cases involve eligible children because most nonadult children live with their parents.

A determination of current market rental value usually is based on a landlord's estimate which we obtain by mail or telephone. However, if the landlord is unable or unwilling to provide an estimate, we contact a knowledgeable source (e.g., a real estate agent). Obtaining a current market rental value estimate is relatively simple except when dealing with some less mainstream housing arrangements that require an estimate from a knowledgeable source. For example, few sources are willing to estimate the value of

arrangements such as room rentals in areas not zoned for rental or old travel trailers parked on another's property without running water or sewer hookups. Providing such estimates is even less appealing given the Social Security Administration's (SSA's) practice of requesting them free of charge.

*BACKGROUND*

The policy of charging income to individuals who receive reduced rent has been challenged and upheld on a number of occasions and by several circuit courts. These courts have expressed the view that such individuals fare better and have more money available to meet other needs than do those who must locate and finance housing on the open market. These courts have remarked that Congress, in defining unearned income as "support and maintenance furnished in cash or kind," contemplated payment of a reduced benefit to those whose essential needs were being satisfied by other means.

However, in 1982 the Seventh Circuit Court of Appeals ruled (in *Jackson*) that the receipt of basic necessities at prices below market value constitutes unearned income only to the extent that it represents increased purchasing power. That court also ordered the amendment of SSI regulations to reflect this principle.

In 1989, *Ruppert* challenged rental subsidy policy (and related issues) in the Second Circuit. That court remanded three of the eleven cases for determinations of whether the rental subsidies charged reflected any actual economic benefit. Although the court did not require application of the *Jackson* regulation, it did suggest that that regulation might provide a good indication of economic benefit.

During the 1980s, the rental subsidy issue received a good deal of attention within SSA. An Acting Commissioner decided that such subsidies should not be treated as income. Then another Commissioner decided to maintain the status quo unless events dictated otherwise. The Policy Council discussed the issue but made no recommendation.

An issue that immediately presents itself in any discussion of rental subsidy is the disparate treatment of rents subsidized by private citizens and those subsidized through public housing. The former are considered income and reduce SSI benefits; the latter are excluded by statute and so have no effect on SSI benefits.

A second frequently posed issue is whether it would be appropriate to use the fair market values established by the Department of Housing and Urban Development (HUD) as a rebuttable presumption of current market rental values. That approach is not viable inasmuch as HUD uses two-bedroom, privately-owned housing as a standard; the result is rental values that are invariably much higher than the presumed maximum value.

*OPTIONS AND DISCUSSION:*

1. OPTION: Change national policy to eliminate consideration of rental subsidies as income.

   DISCUSSION: This option could be achieved through a regulatory change to provide that a rental subsidy is not income. The rationale would be that whatever rent is required represents the current market rental value. This approach would eliminate the only area of in-kind support and maintenance in which we question the

amount of a vendor's charge in determining whether someone is receiving income.

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PROS:

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CONS:

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2. OPTION: Adopt the *Jackson* rule as national policy.

DISCUSSION: Under this option, we would consider that no in-kind support and maintenance arises from an arrangement whereby the required rent equals or exceeds the presumed maximum value. If the required rent is less than the presumed value, the amount of the rental subsidy would be the difference between the required rent and either the presumed value or the current market rental value, whichever is lower. This option would allow a uniform national rule. It would require a regulations change.

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REDACTED INTENTIONALLY]

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PROS:

[REMAINING TEXT OF THIS PARAGRAPH
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CONS:

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3. OPTION: Maintain the status quo; i.e., maintain current national policy for all but the Seventh and Second Circuits.

   DISCUSSION: Under this option, the *Jackson* rule would continue to apply in the Seventh and Second Circuits. In these circuits, therefore, where the required rent equals or exceeds the presumed maximum value, in-kind support and maintenance will not be found as a result of that arrangement. If the required rent is less than the presumed maximum value, the amount of the rental subsidy would be the difference between the required rent and the presumed maximum value or current market rental value, whichever is less. In all other circuits, however, we would continue to consider the

difference between the current market rental value and the amount of rent charged as a rental subsidy. The amount of in-kind support and maintenance charged the individual would be subject to the presumed maximum value.

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PROS:

[REMAINING TEXT OF THIS PARAGRAPH ON PAGE 8 OF THE DOCUMENT HAS BEEN REDACTED INTENTIONALLY]

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CONS:

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*RECOMMENDATION:*

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Following your decision, I will talk with you about the best way to communicate that decision to the panel which has requested that it be publicized.

By: Louis D. Enoff

*DECISION:*

1. OPTION: Change national policy to eliminate consideration of rental subsidies as income.

   Approve _____ Disapprove _____ Date _____

*COMPONENT CONSULTATIONS*

Acting Deputy Commissioner for Finance, Assessment and Management

Concur _____ Nonconcur __X__ Date 5/15/91
See Tab A

Acting Deputy Commissioner for Operations

Concur __X__ Nonconcur _____ Date 4/30/91
See Tab B

Acting Deputy Commissioner for Policy and External Affairs

Concur _____ Nonconcur __X__ Date 5/7/91
See Tab C

2. OPTION: Adopt the *Jackson* rule as national policy.

   Approve _____ Disapprove _____ Date _____

*COMPONENT CONSULTATIONS*

Acting Deputy Commissioner for Finance, Assessment and Management

Concur _____ Nonconcur __X__ Date 5/15/91
See Tab A

Acting Deputy Commissioner for Operations

Concur _____ Nonconcur __X__ Date 4/30/91
See Tab B

Acting Deputy Commissioner for Policy and External Affairs

Concur _____ Nonconcur __X__ Date 4/30/91
See Tab C

3. OPTION: Maintain the status quo; i.e., maintain current national policy for all but the Seventh and Second Circuits.

Approve _____ Disapprove _____ Date _____

*COMPONENT CONSULTATIONS*

Acting Deputy Commissioner for Finance, Assessment and Management

Concur __X__ Nonconcur _____ Date 5/15/91
See Tab A

Acting Deputy Commissioner for Operations

Concur _____ Nonconcur __X__ Date 4/30/91
See Tab B

Acting Deputy Commissioner for Policy and External Affairs

Concur __X__ Nonconcur _____ Date 4/30/91
See Tab C

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OGC has reviewed _____
Comments attached Yes __X__ No ___

Attachments:

Tab A — Acting Deputy Commissioner for Finance, Assessment and Management's Comments
Tab B — Acting Deputy Commissioner for Operations' Comments
Tab C — Acting Deputy Commissioner for Policy and External Affairs' Comments
Tab D — Office of the General Counsel's Comments
Tab E — SSI Modernization Project Expert's Comments